Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1499

J. J. ENOMOTO, et al.,
Petitioners,

vs.

THE UNITED STATES DISTRICT COURT,
NORTHERN DISTRICT OF CALIFORNIA,
Respondent,

JAMES C. WRIGHT, et al.,
Real Parties in Interest.

PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals

EVELLE J. YOUNGER,
Attorney General of the State of California,
JACK R. WINKLER,
Chief Assistant Attorney General—
Criminal Division,
EDWARD P. O'BRIEN,
Assistant Attorney General,
ROBERT R. GRANUCCI,
Deputy Attorney General,
JOHN T. MURPHY,
Deputy Attorney General,
JEROME C. UTZ,
Deputy Attorney General,
KARL S. MAYER,
Deputy Attorney General,
MICHAEL BUZZELL,
Deputy Attorney General,
6000 State Building,
San Francisco, California 94102,
Telephone: (415) 557-0311,
Attorneys for Petitioners.

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PETITION FOR WRIT OF CERTIORARI to the United States Court of Appeals

Petitioners, J. J. Enomoto, et al.,[1] respectfully pray that a writ of certiorari issue to review the order of the United States Court of Appeals for the Ninth Circuit, entered on November 18, 1974, and the order

[1]Petitioners are the defendants below, named in the complaint as follows: J. J. Enomoto, successor in interest as Director of the California Department of Corrections to Raymond K. Procunier, Warden R. M. Rees, successor in interest as Warden of the California State Prison at San Quentin, J. B. Gunn, Warden of Folsom State Prison, and W. T. Stone, Superintendent of the Correctional Training Facility at Soledad. Respondents allege that they are inmates at four California Penal Institutions.

denying rehearing, entered on March 3, 1975; and to review the underlying order of the United States District Court for the Northern District of California, entered on August 2, 1974, which gave rise to the mandamus proceedings in the Court of Appeals. These orders require petitioners to produce for adversary inspection the privileged and confidential contents of at least 1195 inmate files and specified other categories of confidential state government documents, including statements by inmate informers, incident reports, arrest records, coroner's reports, medical reports, and psychiatric reports.

The Court of Appeals' order was entered on petitioners' attempts to obtain interlocutory review of the discovery order by mandamus and by appeal. This single petition for writ of certiorari is submitted to seek review of the order of the Court of Appeals and of the underlying discovery order of the District Court.

OPINIONS BELOW

The order of the Court of Appeals dated November 18, 1974, and the order denying rehearing dated March 3, 1975, have not yet been reported. Copies of these orders are annexed as collective Exhibit A of the appendix to this petition.

The underlying discovery order of the District Court dated August 2, 1974, is annexed as collective Exhibit B. This order incorporates and includes the magistrate's finding and proposed order dated May 28, 1974, and the augmentation of magistrate's findings

dated July 23, 1974. The respondents' request for production of documents dated March 20, 1974, and referred to in the discovery order is annexed as Exhibit C.

JURISDICTION

This Court's jurisdiction is invoked under Title 28, United States Code section 1254 (1).

QUESTIONS PRESENTED

1. Whether the order of the District Court compelling discovery is erroneous and is in violation of Rule 26 (b) (1), Federal Rules of Civil Procedure, in that the District Court declined, in the face of a proper assertion of a qualified privilege, to balance the need of the state government to protect the safety and privacy of inmates, staff and private citizens against the need of respondent prisoners for disclosure of privileged and confidential state government documents.

2. Whether a single judge district court rather than a three judge district court has jurisdiction to enter a discovery order which in effect enjoins the enforcement of California Statutes and compels the petitioners to act contrary to California Statutes.

3. Whether the Fourth Amendment precludes compelling the production of confidential state government documents without a prior judicial determination that there is reasonable cause for their disclosure.

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV:

"The rights of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."

Federal Rules of Civil Procedure, Rule 26 (b) (1):

"Scope of Discovery. Unless otherwise limited by the order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things in the identity and location of persons having knowledge of any discoverable matter. It is not a ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

California Government Code section 6254:

"Except as provided in section 6254.7,[2] nothing in this chapter shall be construed to require disclosure of records that are: (a) Preliminary drafts, notes or interagency or intra-agency memoranda which are not retained by the public agency in the ordinary course of business, provided that the public interest in withholding such records clearly outweighs the public interest in disclosure;

* * *

(c) Personnel, medical or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy;

* * *

(f) Records of complaints to or investigations conducted by, or records of intelligence information or security procedures of the Office of the Attorney General and the Department of Justice, and any state or local police agency, or any such investigatory or security files compiled by any other state or local agency for correctional, law enforcement or licensing purposes;"

[2]Government Code section 6254.7 exempts certain data relating to air pollution.

California Evidence Code section 1040 (b) (1):

"A public entity has a privilege to refuse to disclose official information, and to prevent another from disclosing such information, if the privilege is claimed by a person authorized by the public entity to do so and;

Disclosure is forbidden by an Act of Congress of the United States or a statute of this state;"

California Penal Code section 11142:

"Any person authorized by law to receive a record ['criminal record sheet', or 'rap sheet'] or information obtained from a record who knowingly furnishes the record or information to a person

who is not authorized by law to receive the record or information is guilty of a misdemeanor."

STATEMENT OF THE CASE AND FACTS

A. The Nature of the Action

On August 15, 1973, a complaint for declaratory and injunctive relief was filed in the United States District Court for the Northern District of California. Respondents alleged that the action was authorized by 42 U.S.C. §1983. An amended complaint was filed on December 27, 1973. The amended complaint, which purported to represent named respondents in a civil rights class action, asserted, (1) that the classification procedures utilized by the petitioners with respect to maximum security housing violated respondents' rights to due process, and (2) that confinement in maximum security housing at San Quentin State Prison, Folsom State Prison, the Correctional Institution at Soledad, and Deuel Vocational Institution was in violation of the Eighth Amendment's proscription against cruel and unusual punishment.

The petitioners filed a notice of motion and motion to dismiss the amended complaint on February 7, 1974. On March 18, 1974, the court denied petitioners' motion to dismiss.

B. Proceedings in the District Court

On March 20, 1974, the plaintiffs filed a request for production of documents. Respondents sought for alleged discovery purposes the right to inspect and

copy virtually every document in the custody of the Department of Corrections and the four named state institutions without regard to whether the documents had any relation to the lawsuit. Included were requests to inspect and copy:

> "(1) All logs maintained in the segregated housing units . . .
>
> (2) All 'incident reports' or papers of any other type describing violent incidents, suicide attempts, nervous breakdowns, psychotic episodes, coprophilia or work stoppages occurring in a segregated housing unit at the subject prisons during 1972, 1973 and up to the date of this request.
>
> (3) All coroners' reports or other papers maintained by the CDC at the subject prisons from January 1, 1970 to the present describing all suicides and other deaths of the inmates who, at the time of their death or within 60 days thereof, were confined in the segregated housing unit in one of the subject prisons.
>
> (4) All medical and psychiatric reports during 1972, 1973, and 1974 on inmates who, on the date of said report, were confined in a segregated housing unit at one of the subject prisons.
>
> (5) All files, and papers, however denominated, maintained by the CDC (California Department of Corrections) or any subdivision or official thereof in its Sacramento offices or at any CDC institution, including, without limitation, the inmate's central file . . ." (Emphasis added).[3]

[3]The term central file includes but is not limited to all inmate classification documents, all medical records, all psychiatric and psychological records, all disciplinary records, all records of the California Adult Authority and all records pertaining to transfer of the inmate within a facility or to another facility.

On April 19, 1974, the petitioners filed a response to the request for production of the countless thousands of documents comprehended by respondents' request, advising the court that many of the documents requested by respondents were qualifiedly privileged under both California and Federal law. The qualifiedly privileged documents included incident reports and statements given by confidential informers describing violent prison gang activities including murders, narcotic traffic, extortion and criminal conspiracy. Furthermore, the same objection was made to the indiscriminate release of thousands of medical and psychiatric reports to respondent prisoners.

Respondents moved to compel total discovery and petitioners filed opposition setting forth the same objections; a hearing was held in the district court on this motion on May 13, 1974.

At this hearing the petitioners once again asserted that many of the documents sought by the respondents were entitled to at least a qualified privilege and asked the district court for an *in-camera* hearing prior to ordering any disclosure. Evidence in support of petitioners' argument against indiscriminate disclosure was presented to the district court. This evidence included confidential affidavits of inmates who had been formerly affiliated with outlaw inmate gangs. These inmates averred that they feared for their lives if the respondents were granted blanket access to all the documents sought in their request for production. This fear was based upon the belief that if respondents were allowed to discover documents which revealed information concerning rival prison gangs, the respondents would know the names of members of rival gangs, their location in each institution and other information which could be used by the gangs in their struggle with other gangs, including the names and addresses of families of rival gang members. The district court, which had previously been advised of the fact that respondents were members of rival gangs, refused to consider petitioners' offer of proof and characterized that offer as an aberration.

The district court then referred the motion for discovery to a magistrate who recommended on May 28, 1974, that plaintiffs' motion for production of documents be granted in its entirety. The magistrate also declined to conduct an *in-camera* hearing. In this regard, the magistrate stated:

> "The defendants throughout their documents filed in opposition express deep concern over the existence of prisoner terrorist groups referred to sometimes as the Mexican Mafia and Nuestra Familia. It is the defendants' position that these organized groups of prisoners control narcotic smuggling into the institutions, homosexual activities, and in fact order and carry out the killing of prisoners. The defendants express concern that plaintiffs' lawyers claim to represent prisoners who are members of these warring factions and that in some way this constitutes unethical conduct. Further, defendants express concern that ring leader prisoners presently located in segregated housing may be released as a result of this law suit.

> "While all this may be true, the magistrate finds that such facts are totally ancillary to the issues before the court in these discovery proceedings. The magistrate expresses no opinion as to the truth of any of the claims made by the defendants but only finds that the existence of terrorist gangs and killings within the institutions can play no part in the decisions now to be made by the court." Exhibit B, 6.

On June 6, 1974, the petitioners filed a request for review of the magistrate's findings and recommendations. In this request, the petitioners, again imploring the district court to conduct an *in-camera* hearing prior to ordering indiscriminate disclosure of confidential documents where petitioners had asserted a qualified privilege of nondisclosure, presented the affidavit of Raymond K. Procunier, Director of the California Department of Corrections, which is annexed hereto as Exhibit D. Director Procunier averred that unlimited access by plaintiffs and their attorneys to confidential information would cause a danger to persons; would dangerously impair the ability of the California Department of Corrections to end the power, control, violence, threats, illegal activities and influence of illicit inmate gangs; and would greatly restrict the ability of the California Department of Corrections to program for greater rehabilitation of inmates. This affidavit of the director included specific examples of dangerous situations which would occur should respondents' motion for discovery be granted in its entirety; indicated a willingness to make available to respondents much of the material sought

in their motion; and asked only for the opportunity to remove for presentation to the district court at an *in-camera* hearing documents deemed by petitioners to be highly sensitive. Once again, petitioners' request for an *in-camera* hearing was summarily rejected.

A supplemental request for review of the magistrate's findings and recommendations was filed on July 2, 1974, and on July 10, 1974, a second supplemental request for review of the magistrate's findings and recommendations was filed. The second supplemental request for review was based solely on this Court's decision in *Wolff v. McDonnell,* 418 U.S. 539 (1974).

On August 2, 1974, the district court adopted the magistrate's recommendation and ordered blanket production for inspection of all the documents sought by the respondents, including the central files of the 1195 inmates, without any *in-camera* hearing whatsoever. The district court also ordered petitioners not to talk to any inmate about the lawsuit. Moreover, the district court imposed sanctions upon the petitioners for their assertion of privilege. The only protection for petitioners' interests ordered by the district court was illusory. The district court ruled that petitioners might seek a protective order on a document by document basis with respect to copying, but not with respect to disclosure. A copy of the order of the district court is attached as Exhibit B.

Throughout the proceedings in the district court, petitioners argued that the court as a single judge district court had neither jurisdiction to hear the case

nor the jurisdiction to enter discovery orders which were contrary to state statutes and compelled state officials to act contrary to state statutes. On March 15, 1975, the Chief Judge of the Court of Appeals empaneled a three judge district court.

C. Proceedings in the Court of Appeals

On August 12, 1974 petitioners filed a notice of appeal pursuant to Federal Rules of Appellate Procedure, Rule 4 (a), citing *United States v. Nixon,* 418 U.S. 683 (1974). At the same time petitioners filed a petition for writ of mandate and/or prohibition and a motion for stay of order of production. On August 15, 1974 plaintiffs filed a response to petitioners' motion for a stay.

On September 3, 1974 petitioners filed a supplemental petition for writ of mandamus and/or prohibition. On November 18, 1974 the Ninth Circuit denied the petition without hearing. The stay had previously been vacated. A petition for rehearing, suggestion for rehearing en banc and stay was then filed with the Ninth Circuit. On March 3, 1975, the Ninth Circuit denied the petition for rehearing, rejected the suggestion for a rehearing en banc and denied the motion for stay, citing the case of *Kerr v. United States District Court,* 511 F.2d 192 (1975) certiorari granted May 27, 1975, No. 74-1023. Copies of the Ninth Circuit orders are attached. Mr. Justice Brennan stayed the order of production insofar as it required petitioners to produce documents from inmate files pending the filing of this petition and ruling on it.

REASONS FOR GRANTING THE WRIT

PRELIMINARY STATEMENT

The disclosure of thousands of state prison records has been ordered. The fact that many of these documents contain highly sensitive matters is undisputed. The custodian of these records, the Director of Corrections, personally asserted at the proper time and place that these confidential records were qualifiedly privileged. He sought only an *in-camera* hearing to allow the district court to weigh his assertion of confidentiality against any assertion by respondents of their need for the documents in the litigation. Even apart from the affidavit of the director, the description of the documents sought by respondents makes their confidential content apparent, while the usefulness of the documents to the respondents is at best speculative.

Notwithstanding the repeated efforts of petitioners to obtain a preliminary review from the district court, all relief was denied. The Court of Appeals also refused to afford necessary relief by mandamus or appeal. This case thus involves a serious question of far reaching impact concerning discovery in suits initiated by prisoners under the Civil Rights Act (Title 18 U.S.C. section 1983 et seq.) against their custodians. This petition for certiorari must be granted to review not only the denial of relief in the courts below, but also to establish guidelines for discovery when confidential and privileged state government documents are at issue. That this is not an isolated incident is demonstrated by the petition for certiorari

in the case of *Kerr v. United States District Court*, No. 74-1023, granted May 27, 1975, which also seeks review of an order for the indiscriminate production of thousands of prison records.

I

THE ORDER OF THE DISTRICT COURT COMPELLING DISCOVERY IS CONTRARY TO RULE 26 (b) (1), FEDERAL RULES OF CIVIL PROCEDURE, IN THAT THE DISTRICT COURT REFUSED IN THE FACE OF A PROPER ASSERTION OF QUALIFIED PRIVILEGE TO WEIGH THE UTILITY OF THE DOCUMENTS TO THE PLAINTIFFS AGAINST THE NEED OF THE CALIFORNIA DEPARTMENT OF CORRECTIONS TO MAINTAIN THEIR CONFIDENTIALITY

Many of the documents sought by the plaintiffs are qualifiedly privileged under California law, since it is recognized that the State has the right to maintain confidentiality of documents to preserve the security of a penal institution and the security of informants or others who might be endangered by disclosure. *In re Olson*, 37 Cal.App.3d 783 (1974), 112 Cal. Rptr. 579; see also *Procunier v. Superior Court*, 35 Cal.App.3d 207, 110 Cal. Rptr. 529 (1970); *Yarish v. Nelson*, 27 Cal.App.3d 901-902, 104 Cal. Rptr. 205, 211-212 (1972).

Under federal law, documents, the disclosure of which will jeopardize national security, individual rights or personal safety, are also qualifiedly privileged. When a civil litigant in a federal proceeding seeks discovery of a document in the face of a proper assertion of qualified privilege, the district court must

hold an *in-camera* hearing and balance the need for the document by the party seeking discovery against the reasons asserted for maintaining confidentiality. *United States v. Reynolds*, 345 U.S. 1, 11 (1953); *Committee for Nuclear Responsibility, Inc. v. Seaborg*, 463 F.2d 788, 792 (D.C. Cir. 1971); *Carr v. Monroe Manufacturing Company*, 431 F.2d 384 (5th Cir. 1970).

Although the director of corrections personally by affidavit asserted the privilege in the precise manner set forth by the Court in *United States v. Reynolds, supra*, at 7-8, the district court, contrary to law, refused to balance any competing interest between respondents and the petitioners. On the contrary, the district court adopted the magistrate's findings which included the express finding that it made no difference whether discovery in the instant case created a substantial risk of danger to inmates, their families and staff. Exhibit B, 6. This finding is at total variance with the views of this Court expressed in *Wolff v. McDonnell*, 418 U.S. 539 (1974). In *Wolff*, this Court stated as follows in ruling that an inmate does not have the constitutional right to confrontation and cross-examination in prison disciplinary proceedings:

> "We recognize that the problems of potential disruption may differ depending on whom the inmate proposes to cross-examine. If he proposes to examine an unknown fellow inmate, the danger may be the greatest, since the disclosure of the identity of the accuser, and the cross-examination which will follow, may pose a high risk of reprisal within the institution. Conversely, the inmate accuser, who might freely tell his story

privately to prison officials, may refuse to testify or admit any knowledge of the situation in question. Although the dangers posed by cross-examination of known inmate accusers, or guards, may be less, the resentment which may persist after confrontation may still be substantial. Also, even where the accuser or adverse witness is known, the disclosure of third parties may pose a problem." *Id.* at 568-569.

These interests, deemed important enough by this Court to restrict an inmate's right to confrontation of his accusers in a prison disciplinary proceeding, were regarded by the district court as "totally ancillary" in the discovery proceedings below. Indeed, in *Wolff*, this Court permitted prison officials to make a conclusive determination against disclosure in the disciplinary setting; here petitioners request no more than that a neutrai and detached judicial officer make such determination in a discovery proceeding.

The drafters of Rule 26 (b) (1) Federal Rules of Civil Procedure recognized that discovery could be limited by a proper assertion of privilege. Petitioners respectfully submit that they properly invoked a qualified privilege. The district court was therefore required to hold an *in-camera* hearing and its failure to do so reflected a total disregard for the dangers involved in its indiscriminate discovery order.

II

A SINGLE JUDGE DISTRICT COURT HAS NO JURISDICTION TO ENTER A DISCOVERY ORDER WHICH IN EFFECT ENJOINS THE ENFORCEMENT OF CALIFORNIA STATUTES AND COMPELS THE PETITIONERS TO ACT CONTRARY TO CALIFORNIA STATUTES

California Government Code section 6254 exempts from disclosure requirements personnel, medical or similar files, the disclosure of which would constitute unwarranted invasion of personal privacy. This section also exempts from disclosure investigatory or security files compiled by California Department of Justice or any other State or local agency for correctional purposes. California Evidence Code section 1040 (b) (1) provides that a public entity has a privilege to refuse to disclose official information if the privilege is claimed by a person authorized by the public entity to do so and the disclosure is forbidden by an act of Congress of the United States or by a California law. California Penal Code section 11142 provides that any person authorized by law to receive a record such as a "criminal record sheet" or "rap sheet" or information obtained from a record who knowingly furnishes the record or information to a person not authorized by law to receive it is guilty of a misdemeanor. The discovery order of the district court is enforceable by the power of contempt, and thus tantamount to an injunction prohibiting petitioners from obeying these state laws. No cloud of unconstitutionality hovers over these provisions of state law.

Petitioners submit that the single judge district court was without jurisdiction to enter a discovery

order which as applied invalidates state statutes and compels the petitioners to act in derogation of their official duties. Title 28 U.S.C. section 2281 provides that the single judge district court is without jurisdiction to enter an interlocutory or permanent injunction restraining the enforcement of a state statute on the ground of its unconstitutionality. "The crux of the business [the requirement for a three judge court set forth in Title 28 U.S.C. section 2281] is procedural protection against improvident state-wide doom by a federal court of the state's legislative policy." *Phillips v. United States,* 312 U.S. 246, 251 (1941); *Gilmore v. Lynch,* 400 F.2d 288, 230 (9th Cir. 1968). California's legislative policy as interpreted by its courts imposes upon petitioners the duty to preserve the confidentiality of the documents at issue here. (*In re Harrell,* 2 Cal.3d 675, 691 (1970); *Procunier v. Superior Court,* 35 Cal.App.3d 207 (1973)). Surely a single federal judge can not accomplish by means of a discovery order what he could not accomplish by means of an injunction.

III

THE FOURTH AMENDMENT PRECLUDES COMPELLING THE PRODUCTION OF CONFIDENTIAL GOVERNMENT DOCUMENTS WITHOUT A PRIOR JUDICIAL DETERMINATION THAT THERE IS REASONABLE CAUSE FOR THEIR DISCLOSURE

The decision below violates the fundamental right to be free from unreasonable search and seizure. Expectations of privacy, insofar as they are reasonable, are protected by the Fourth Amendment. Compulsory

process for the production of documents may not issue in derogation of the Fourth Amendment. An order compelling the disclosure of privileged documents is not authorized by statute, and is as defective as is a search warrant issued without probable cause. An order compelling the production of confidential documents, without a prior determination that their utility in the litigation is paramount, is as objectionable as is a general search warrant.

The essence of the Fourth Amendment is the protection of reasonable expectations of privacy. When a person communicates information to government officials in confidence, he may reasonably expect that the confidence will be maintained unless a justification for disclosure is found to outweigh the justification for confidentiality. In such circumstances, the expectation is not that disclosure is inevitable (*Couch v. United States,* 409 U.S. 322, 335 [1973]), but rather that confidentiality will be asserted. Similarly, when a government official's duties include control over confidential documents, he may reasonably expect that he will not be compelled to disclose information unless the justification for disclosure is found to outweigh the reasons for confidentiality. In such circumstances, the official cannot be said to be assuming a duty to disclose the documents (*Davis v. United States,* 328 U.S. 582, 589-590 [1946]), but rather is assuming a duty to assert their confidentiality. Therefore, it is reasonable to expect that confidential documents will not be disclosed unless it is shown that the justifications for disclosure are paramount. Such an expectation is in fact protected by the Fourth Amendment.

This is true since the essence of a search and seizure is not the physical intrusion and taking of property but the element of compulsion (*Boyd v. United States,* 116 U.S. 616, 621-622 [1886]). Compulsory process for the production or inspection of documents is subject to the limitations inherent in the Fourth Amendment, and any order pursuant to Rule 37 of the Federal Rules of Civil Procedure, compelling a party to produce documents, is likewise subject to the limitations of the Fourth Amendment. By analogy, a search warrant may issue only upon probable cause. Compulsory process, whether it be in the form of a discovery order or otherwise, may issue only upon statutory or constitutional authorization. *Oklahoma Press Publishing Company v. Walling,* 327 U.S. 186, 209 (1946). Rule 26 (b) (1) of the Federal Rules of Civil Procedure goes a step further and explicitly exempts from discovery matters which are privileged. Confidential state documents are privileged as a matter of law unless there is a showing and a determination that their utility in the litigation is paramount to their confidentiality. Accordingly, a court order compelling the production of confidential documents, without a prior *in-camera* inspection and determination, is necessarily in direct violation of Rule 26 itself. Such an order is explicitly precluded by Rule 26 (b) (1) of the Federal Rules of Civil Procedure and is in effect analogous to the search warrant issued without probable cause. As such, the Fourth Amendment precludes the issuance of such an order or if the order is issued, makes it unconstitutional and without effect.

CONCLUSION

This is an important case. Petitioners respectfully request this court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review and reverse the order of discovery entered by the District Court.

Dated, May 27, 1975.

EVELLE J. YOUNGER,
Attorney General of the State of California,

JACK R. WINKLER,
Chief Assistant Attorney General,
Criminal Division,

EDWARD P. O'BRIEN,
Assistant Attorney General,

ROBERT R. GRANUCCI,
Deputy Attorney General,

JOHN T. MURPHY,
Deputy Attorney General,

JEROME C. UTZ,
Deputy Attorney General,

KARL S. MAYER,
Deputy Attorney General,

MICHAEL BUZZELL,
Deputy Attorney General,

Attorneys for Petitioners.

(Exhibits Follow)

Exhibits

Exhibit A

United States Court of Appeals
for the Ninth Circuit

No. 74-2510

Raymond K. Procunier, Director of the Department of Corrections of the State of California; W. T. Stone, Superintendent of the California Correctional Training Facility at Soledad; Jacob Gunn, Warden of the California State Prison at Folsom; Louis S. Nelson; and L. N. Patterson, Superintendent of the Deuel Vocational Institution,
Petitioners,

vs.

United States District Court,
Northern District of California,
Respondent,

James C. Wright, Jerry Lee Pena, Roberto Pablo Salas, Michael S. Guile, Louis X. Richardson, Roberto Frias,
Real Parties in Interest.

[Filed Mar. 3, 1975]

ORDER

Before: HUFSTEDLER and WALLACE, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing as unnecessary (see *Kerr v. United States District Court*, ... F.2d ..... (9th Cir.

Jan. 17, 1975)), and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed.R.App.P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

The motion for a stay is denied.

United States Court of Appeals
for the Ninth Circuit

No. 74-2510

Raymond K. Procunier, Director of the Department of Corrections of the State of California; W. T. Stone, Superintendent of the California Correctional Training Facility at Soledad; Jacob Gunn, Warden of the California State Prison at Folsom; Louis S. Nelson; and L. N. Patterson, Superintendent of the Deuel Vocational Institution,
Petitioners,

vs.

United States District Court,
Northern District of California,
Respondent,

James C. Wright, Jerry Lee Pena, Roberto Pablo Salas, Michael S. Guile, Louis X. Richardson, Roberto Frias,
Real Parties in Interest.

[Filed Nov. 18, 1974]

ORDER

Before: HUFSTEDLER and WALLACE, Circuit Judges.

Upon due consideration, the petition for writ of mandamus filed herein on August 12, 1974 and the supplemental petitions for writ of mandamus filed September 3, 1974 are denied. The notice of appeal filed August 12, 1974 is hereby dismissed.

Exhibit B

In the United States District Court for
the Northern District of California

Civ. No. C-73-1422 SAW

James C. Wright, et al.,
Plaintiffs,
vs.
Raymond K. Procunier, et al.,
Defendants.

[Filed Aug. 22, 1974]

ORDER

This Motion, on July 11, 1974, came on to be heard on defendants' Request for Review of Magistrate's Findings and Recommendations of May 28, 1974. Having heard argument by counsel on defendants' Motion:

It Is Ordered that the Magistrate's Findings and Proposed Order dated May 28, 1974, and consisting of nine pages with Annex I, and attached hereto, is affirmed.

It Is Further Ordered that the May 28, 1974, Magistrate's Findings and Proposed Order as affirmed is adopted as the Order of this Court except as modified by the succeeding two paragraphs of this Order.

It Is Further Ordered that, as to Item No. 24 of the Order requiring production of documents (Magistrate's Findings and Proposed Order, p. 9), the production of each "complete inmate central file" shall be understood to have that meaning contained in the Augmentation of Magistrate's Findings Lodged July 4, 1974, which document, consisting of two pages is attached hereto, and made part of this Order and hereby approved by this Court.

It Is Further Ordered that the Court reserves judgment on whether the defendants shall be required to pay sanctions. Leave is granted to plaintiffs to file with this Court a petition for sanctions but this Court is not disposed to grant sanctions at this time.

Dated: Aug. 3, 1974

/s/ Stanley Weigel
Judge, United States District Court

In the United States District Court for
the Northern District of California

Civ. No. C-73-1422 SAW

Jamie Gonzalo, et al.,
Plaintiffs,
vs.
Raymond K. Procunier, et al.,
Defendants.

[Filed Aug. 2, 1974]

MAGISTRATE'S FINDINGS AND PROPOSED ORDER

General

On or about March 20, 1974, plaintiffs served the defendants with a request for production of documents. There are 24 separate categories contained in the request, plus a request for photographs. On April 19, 1974, defendant filed a response which in substance objected to production of just about everything plaintiffs asked for. Thereafter, on May 8, 1974, plaintiffs filed a notice of motion and motion to compel production of documents and for costs.

At the same time that the motion to compel production of documents was filed plaintiffs filed a second motion entitled "Notice of Motion and Motion for Investigation, Protective Order and Specified Discovery Procedures." Both of these motions were noticed

before Judge Weigel despite the fact that the Judge had previously entered an order referring all discovery matters to the magistrate. Plaintiffs made reference to this in their second motion pointing out that one of the remedies they were seeking was an order returning all discovery matter to Judge Weigel for hearing and decision.

Both motions were noticed for hearing before Judge Weigel on May 17, 1974. In the meantime, the first named plaintiff Jamie Gonzalo had notified his lawyers that he no longer wanted to be in the lawsuit and wanted to discharge his lawyers. Thus, counsel had to bring on a third motion that they be relieved as counsel for Jamie Gonzalo and that Jamie Gonzalo's name be stricken from the pleadings. Judge Weigel granted this last motion and after hearing some rather extensive arguments in open court concluded that the remaining two motions should be referred to the magistrate for further hearing, appropriate findings and recommendations. The magistrate calendared the matter for hearing on Wednesday, May 22, 1974.

Discussion

It is important to keep in mind the nature of this case and the relief sought in the prayer of the complaint. Plaintiffs characterize this as a class action brought by the named plaintiffs on behalf of all prisoners at San Quentin, Folsom, Soledad and Deuel who are confined against their will in segregated housing for periods in excess of 30 days or who in

the future may be confined against their will for periods in excess of 30 days. (Complaint ¶14)

The Complaint asserts that plaintiffs and many others presently housed in segregated housing were placed there without any hearing and for indefinite periods which constitutes a denial of due process in violation of the 14th Amendment. Further, plaintiffs claim that the housing units themselves are unsanitary and constitute a threat to their physical and mental wellbeing. This is equated to cruel and unusual punishment in violation of the 8th Amendment. It is largely to these constitutional issues that the lawsuit addresses itself.

Much is made of the so-called attorney-client relationship in considering access of the attorneys to their clients who are prisoners inside these various institutions. Where there is a clearcut attorney-client relationship unquestionably the lawyers should have ready access to their clients. However, since this is a class action, it is not quite so clear that all persons who are members of the class have the same attorney-client relationship as exists between the lawyers and the named plaintiffs. Moreover, all agree that there are prisoners located in segregated housing units who are there at their own request. Clearly they are not within the class envisioned by the pleadings. Such individuals might very well be helpful to the plaintiffs' case as witnesses in attempting to prove that housing conditions are unsanitary in the segregated housing units as a whole, even though they are not

parties nor members of the class. As to them, obviously there is no attorney-client relationship.

Because plaintiffs assert that a class exists, sooner or later they will bear the burden of going forward under an appropriate Rule 23 motion to persuade the court to establish the class. It is important in light of the injunctive and declaratory relief on behalf of future prisoners that such a class determination be made as soon as possible.

The defendants throughout their documents filed in opposition express deep concern over the existence of prisoner terrorist groups referred to sometimes as the Mexican Mafia and Nuestra Familia. It is the defendants' position that these organized groups of prisoners control narcotic smuggling into the institutions, homosexual activities, and in fact order and carry out the killing of prisoners. The defendants express concern that plaintiffs' lawyers claim to represent prisoners who are members of these warring factions and that in some way this constitutes unethical conduct. Further, defendants express concern that ringleader prisoners presently located in segregated housing may be released as a result of this lawsuit.

While all of this may be true, the magistrate finds that such facts are totally ancillary to the issues before the court in these discovery proceedings. The control of the prison population and its administration is a problem for the State authorities. This case deals with procedural safeguards and housing conditions which, if plaintiffs are successful, will be estab-

lished with or without terrorist gangs and unaffected by them. The magistrate expresses no opinion as to the truth of any of the claims made by the defendants but only finds that the existence of terrorist gangs and killings within the institutions can play no part in the decisions now to be made by the court.

Findings

Moving to the plaintiffs' motions which are before the court:

1. Plaintiffs seek an order directing inquiry into the facts and circumstances by which Jamie Gonzalo determined to withdraw from the lawsuit. Based on the moving papers and arguments of counsel I find that if Gonzalo's decision is traceable to any acts or conduct on the part of defendants, their agents, officers or attorneys, this would constitute contempt of court in violation of Judge Weigel's order entered March 18, 1974. If plaintiffs believe this is the case they can move the court by an appropriate motion to cite one or more of the defendants for contempt. If such a motion is filed, then discovery might justify this kind of inquiry. At the moment it too is a matter ancillary to the primary issues in this case. Therefore, I recommend that the court deny without prejudice this motion that an inqury be made.

2. With respect to the motion that the court dissolve its order of March 18, 1974, referring all discovery to the magistrate, plaintiffs' objections are based on the local discovery rules (Local Rule 121(e)) which plaintiffs claim cause delays of up to 30 days or more

when magistrates hear discovery motions and the parties are permitted to appeal back to the District Court. I find that compliance with the local rules would not cause unwarranted delays in moving the case along and I recommend that this motion be denied.

3. The plaintiff seeks an order permitting plaintiffs' counsel and attorney designees (certified law students and investigators as well as experts) to have access to all members of the class as well as prospective witnesses. The magistrate finds that this is a definable class, readily identified. It is made up of prisoners in the segregated housing units. A roster can be prepared by defendants and are asked for as Item 18 of the request for production of documents. Inmates who are in segregated housing at their own request can be marked with an asterisk and would be called only as witnesses. Until the court enters its order establishing the class and modifying discovery orders, I recommend that all inmates other than named plaintiffs be classed as witnesses. Nevertheless, they should be available to plaintiffs' attorneys on a regular schedule. Plaintiffs propose an order to regulate access to the members of the class which is attached hereto as Annex I. I recommend it be adopted as the order of the court.

Defendants urge that visiting in the prisons is a matter covered by prison regulations and Department of Corrections regulations. Defendants further assert that if those visiting regulations are to be changed it can only be done following an attack on their constitutionality before a three-judge court. The mag-

istrate finds that such administrative regulations must be by-passed in order that the lawsuit may be pursued in its discovery phase without unwarranted delay and interruption. No issue is raised by plaintiff as to whether or not such regulations are constitutional and we need not reach such an issue in this discovery motion.

4. Plaintiffs seek an order prohibiting defendants, their attorneys, agents and employees, from discussing the case with persons who have established a lawyer-client relationship with the plaintiffs' attorneys. This was discussed before Judge Weigel on March 15, 1974. The defense claims some sinister motive behind this proposal but the magistrate finds that nothing in the contemplated order precludes prison personnel from talking to any of these prisoners about matters dealing with a prisoner-custodial relationship so long as no one on the defense side of the case tries to talk to prisoners about this class action lawsuit on its merits. And with that in mind, this motion should be granted.

5. Plaintiffs next seek an order that "all discovery shall pertain to members of and issues related to the class alleged by the plaintiffs." This is simply an effort by the plaintiffs to have the matter treated as a class action pending an appropriate motion and ruling by the court determining the nature and definition of the class. As an abstract proposition it should present no problems and I recommend that this be granted.

6. Plaintiffs seek an order that they be entitled to take depositions of any five correctional officers designated by them in writing and in each case the deposition limited to no more than seven hours. Such a request in the magistrate's opinion constitutes an unnecessary procedural burden. Any correctional officer who has information dealing with issues in this lawsuit is a prospective witness and any prospective witness may have his noticed deposition taken when properly served with an appropriate summons. On the present showing I find no basis for limiting plaintiffs only to five correctional officers or to the deposition length of no more than seven hours. I recommend that this order be denied.

7. Plaintiffs request an order that documents properly produced by defendants and designated by plaintiffs to be reproduced be copied by defendants and delivered to plaintiffs within two weeks from such designation at a cost to plaintiffs not to exceed three cents a page. I believe that these documents which for the most part constitute prison files and records must be maintained at the various prison facilities and therefore, it is appropriate that defendants be called upon to make the copies. Moreover, I think it is not unreasonable to ask defendants to complete the copying within two weeks from the time that the document is identified. With respect to the court setting a price ceiling on costs of reproduction, this should be denied. Certainly defendants should not be permitted to show a profit but they are entitled to recover all of their costs for making copies whatever those costs may be and I recommend that the court enter its order accordingly.

Moving next to the motion filed by plaintiffs to compel production of documents and for costs, the magistrate finds that this case at this time should be treated as a class action. The motion seeks discovery of information that would develop evidence material to the class action issue. It is clearly relevant and it should be granted with certain limitations which I will cover in the paragraphs which follow.

The first item requested by plaintiffs is for an order directing that three *"experts"* designated by plaintiffs be permitted to inspect and photograph all segregated housing units and that two attorneys representing plaintiffs accompany the experts. It is clear that plaintiffs have alleged unsanitary, crowded, inadequately lit housing facilities, and the only way to show this to the court is by means of photographs or an inspection by the court. I have some difficulty in finding the need for *three* individuals called *"experts"* unless by expert is intended a professional photographer. As interpreted the request of plaintiff should be granted.

Moving next to the 24 categories of documents:

Item No. 1 asks for logs maintained in segregated housing units but does not fix any time limits. It would appear that this request should be granted with a date beginning January 1, 1971 up to the present time.

Items 2-16 should be granted.

Item No. 17 asks for all medical and psychiatric reports during 1972, 1973 and 1974, on inmates who,

on the date of said report, were confined in a segregated housing unit at one of the subject prisons. Any medical reports which deal with individuals who are not members of the purported class should not be released without the written consent of the individual involved. Records on class members should be made available under a suitable protective order. (See Item 24)

Item No. 18 is a request for rosters such as I discussed in paragraphs above dealing with the right of the plaintiffs to interview members of the class and prospective witnesses. Clearly this should be granted.

Items 19-23 should be granted.

Item No. 24 asks for the complete inmate central file for each inmate who is presently housed in the segregated housing units of the four named institutions. I believe the motion should be granted subject to a protective order which limits access to the attorneys for the plaintiff class and not attorney designees. Further, that the production be made at the facility where the records are kept rather than delivery to the plaintiffs' law offices and further that any particular items contained in those files which plaintiffs desire to have duplicated can, on a proper showing by the defendants, be duplicated subject to some form of confidentiality or protected right of privacy. Defendants may submit a form of protective order.

I find that plaintiffs' motion for costs in bringing both of these motions should be granted. Defendants'

motion for costs should be denied. Plaintiffs should, within 30 days following entry of the court's order, file with the court a detailed affidavit in support of their claim for costs setting forth the amount they seek and the basis on which the total is computed, together with a form of order for the court to sign awarding costs in that amount.

Dated: May 28, 1974.

Respectfully submitted,

/s/ Owen E. Woodruff, Jr.
Owen E. Woodruff, Jr.
United States Magistrate

It Is So Ordered.
Dated: 8/2/74.

/s/ Weigel
United States District Judge

ANNEX 1

Proposed Amendment to Plaintiffs' Proposed Order In Gonzalo v. Procunier

It Is Further Ordered that plaintiffs' counsel and also plaintiffs' law students and investigators, and experts designated by them (herein referred to as "attorney designee") shall have free and reasonable access on Tuesday, Wednesday and Thursday, to all members of the alleged class and prospective witnesses within the California Prison System and during the hours of 8:30 A.M. to 5:00 P.M. Names of attorney designees and prisoners to be interviewed shall be required to be given by plaintiffs' counsel to defendants, in writing, at least 24 hours in advance of the visit of an attorney or his designee to a California prison. From the time of appearing at the prison entrance no such plaintiffs' counsel or attorney designee shall be required to wait more than 30 minutes to commence an interview with the first prisoner to be seen that day, and subsequent interviews with prisoners shall commence no more than 15 minutes after the termination of the previous interview. Defendants will insure that such access by plaintiffs' counsel and designees will permit confidential and free communication between the visitor and the client and in comfortable surroundings.

In the United States District Court for
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Jamie Gonzalo, et al.,
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Defendants.

[Filed Aug. 2, 1974]

AUGMENTATION OF MAGISTRATE'S FINDINGS LODGED MAY 28, 1974

On May 28, 1974, the Magistrate submitted findings and a proposed form of order concerning plaintiffs' Motion to Compel Production filed May 8, 1974. On Page 9 thereof, beginning on Line 5, there appears the following: "Item No. 24 asks for the complete *inmate central file* * * * " (italics supplied).

In an appearance before Judge Weigel on July 11, 1974, a dispute arose as to what documents comprise the inmate central file. Judge Weigel directed the parties to return to the Magistrate's Court for clarification and/or definition. The matter was noticed for oral argument on Tuesday, July 23, 1974, at 10:30 a.m. Counsel expressed their views, and the Magistrate agreed with Mr. Utz that the definition should be what the Magistrate had in mind at the time he lodged his findings.

There follows by description of what I expect the defendants to produce in compliance with the order submitted to Judge Weigel for signature.

Central Files include, but are not limited to, all materials written, printed, typed, photographed or recorded concerning the named prisoner while he is in the custody of the Department of Corrections pursuant to the sentence and judgment of the State Court. These will include all documents generated pursuant to classification; all medical records; all psychiatric records, to include test results of psychological testing administered; all disciplinary records; all records dealing with appearance before the Adult Authority when defendant becomes eligible for consideration for parole or determination of fixed sentence by the Adult Authority; all records of board proceedings where prisoner was the subject; all records of transfer from one facility to another within the state prison system, from one custodial status to another within a single facility, or from one facility to another.

As can be seen from the foregoing description, it is the Magistrate's understanding that the central file constitutes the repository for all records on a given prisoner, regardless of source or purpose.

Dated: July 23, 1974.

Respectfully submitted,

/s/ Owen E. Woodruff, Jr.
Owen E. Woodruff, Jr.
U. S. Magistrate

Exhibit C

(Names and addresses of attorneys omitted)

In the United States District Court for
the Northern District of California

Civ. No. C-73-1422 SAW

Jamie Gonzalo, et al.,
Plaintiffs,

vs.

Raymond K. Procunier, et al.,
Defendants.

REQUEST FOR PRODUCTION OF DOCUMENTS

I. Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs hereby request that three experts designated by plaintiffs be permitted to inspect and photograph all segregated housing units at the California State Prisons at San Quentin and Folsom, the California Training Facility (Soledad), and the Deuel Vocational Institution (DVI), including, without limitation, B-Section, the North Segregation Unit and the Adjustment Center at San Quentin; the Security Housing Unit at Folsom; O-Wing, X-Wing and Y-Wing at Soledad; and K-Wing, L-Wing, East Hall and West Hall at DVI. Said inspection and photographing is to be permitted on six hours' notice to counsel for defendants on any weekday between the

hours of 9 a.m. and 5 p.m. during the period from April 15, 1974 to July 30, 1974, and two attorneys representing plaintiffs shall be permitted to accompany the aforesaid experts.

II. Pursuant to Rule 34 of the Federal Rules of Civil Procedure, plaintiffs hereby further request that defendants collectively produce for inspection and copying on May 1-5, 1974, at the State Building, 350 Golden Gate Avenue, San Francisco, California, each of the documents hereinafter specifically set forth.

Where lists, files, computer information, memos, documents, logs, reports, studies—official and unofficial, or papers of any form or kind however denominated (sometimes collectively herein referred to as "papers") are referred to, the papers called for are not only those in the possession or subject to the control of defendants, but all papers, not privileged, in the possession, custody, or subject to the control or order of defendants' staff, employees, assistants, attorneys, statisticians, accountants, auditors, consultants and subsidiary boards and commissions. If such papers are known to defendants, or any of them, to be in existence but defendants, or any of them, are for any reason unable or unwilling to make them available, please so state, including the specific reason. For each of such papers for which a claim of privilege or confidentiality is made, the paper(s) for which such a claim is made should be described in detail, including the title, date, location and custodian of such paper(s) and the precise claim of privilege or confidentiality shall be made in the response hereto.

1. All logs maintained in the segregated housing units at the California State Prisons at San Quentin and Folsom, the California Training Facility (Soledad), and the Deuel Vocational Institution (DVI) (said four prisons are thereinafter collectively referred to as "the subject prisons"), including, without limitation, all isolation and segregation logs.

2. All CDC 114 and 114a forms made out on inmates at the subject prisons during 1972, 1973, and up to the date of this request.

3. All "incident reports" or papers of any other type describing violent incidents, suicide attempts, nervous breakdowns, psychotic episodes, coprophilia or work stoppages occurring in a segregated housing unit at the subject prisons during 1972, 1973 and up to the date of this request.

4. All reports and papers concerning the use of mace, lachrymating powder or other chemical agents commonly referred to as "tear gas" in a segregated housing unit at the subject prisons during 1972, 1973 and up to the date hereof including, but not limited to all sales documents or receipts concerning the purchase of such chemical agents.

5. All monographs, studies, reports or other papers, whether published or unpublished, by CDC staff or consultants or committees or commissions designated by the CDC or the Board of Corrections concerning the use of or conditions in segregated housing units at the subject prisons or at any other prison facility administered by the CDC, including, without limitation, the "Correctional System Study" published by the Board of Corrections in July, 1971.

6. Copies of all testimony or written statements of officials or employees of the CDC or Board of Corrections submitted to state or federal governmental agencies in 1971, 1972, 1973 and 1974 concerning proposed legislation.

7. All coroners reports or other papers maintained by the CDC or the subject prisons from January 1, 1970 to the present describing all suicides and other deaths of inmates who, at the time of their death or within 60 days thereof, were confined in a segregated housing unit at one of the subject prisons.

8. All directives, memoranda, policy statements or other papers issued by defendant Procunier, CDC staff in Sacramento or defendants Stone, Gunn, Patterson and Nelson concerning establishment or implementation of the policy of confining inmates in segregated housing units under "Director's Designation."

9. All lists or other papers identifying by name and number inmates who are now or during the past 36 months were confined in segregated housing units at the subject prisons by "designation" of defendant Procunier (i.e., inmates on the so-called "Director's caseload") indicating the particular segregated housing unit at which each inmate is or was confined.

10. All papers concerning complaints about CDC staff members assigned to segregated housing units at the subject prisons, from whomever submitted, from January 1, 1971 to the date of this request, including without limitation all related investigations, reprimands, and punishments imposed as a result thereof.

11. All papers received by defendants and their agents from January 1, 1971 through the date of this request, which contain or pertain to complaints from inmates concerning conditions in segregated housing units at the subject prisons, including without limitation all so-called demands or petitions, whether or not related to a hunger strike or work stoppage or any threat thereof.

12. All administrative appeals submitted in writing to defendants and their agents from January 1, 1971 through the date of this request from any inmate who at the time of said appeal was confined in a segregated housing unit at the subject prisons.

13. All criticism of or suggestions for change with respect to conditions in the segregated housing units at the subject prisons which have been reduced to writing and received by defendants from any employee of the CDC from January 1, 1971 through the date of this request.

14. All documents and other papers which show, on a daily basis for the past 3 years, for each segregated housing unit in each of the subject prisons, whether or not a visit was in fact made to said units by a (i) licensed physician and/or (ii) paramedical employee, including without limitation, the identity of the physician or employee and the length of the visit.

15. All memoranda, directives and other papers concerning the use by correctional officers of fire arms to quell disturbances in segregated housing units at the subject prisons, or the exercise yards thereof, including, but not limited to,

manufacturers' descriptions of the fire arms and ammunition used for such purposes, and all incident reports on such usage since January 1, 1972.

16. All photographs taken by CDC personnel or their agents, including counsel for defendants herein, of inmates of segregated housing units at the subject prisons, or the premises thereof, since January 1, 1971.

17. All medical and psychiatric reports during 1972, 1973 and 1974 on inmates who, on the date of said report, were confined in a segregated housing unit at one of the subject prisons.

18. All lists, reports, documents and other papers containing the names and numbers of all inmates who, on the date of this request, were confined in a segregated housing unit in the subject prisons; the particular segregated housing unit in which each such inmate was then confined; whether the segregation of each such inmate was for "medical," "psychiatric," "disciplinary," or "administrative" reasons (as those terms are used in Director's Rule DP-4601); and the number of both consecutive and non-consecutive days each such inmate had served in said segregated confinement on the date of this request.

19. All memoranda, reports or other papers given by CDC personnel at the subject prisons or the CDC office in Sacramento or their agents to the California Adult Authority or members or representatives thereof since January 1, 1971, concerning inmates who, at the time such memoranda, reports or other papers were given, were confined in segregated housing units at said prisons.

20. All memoranda, reports or other papers given by members, representatives or agents of the California Adult Authority to CDC personnel at the subject prisons or the CDC office in Sacramento, or their agents, since January 1, 1971, concerning inmates who, at the time such memoranda, reports or other papers were given, were confined in segregated housing units at said prisons.

21. All press releases or other papers issued to the print or broadcast media by the CDC or by CDC officials, including officials assigned to the subject prisons, since January 1, 1971; and all tape recordings and transcripts of interviews during said years between CDC officials and representatives of the print and broadcast media.

22. All reports on other papers maintained by the CDC (or any sub-division or officials thereof) concerning control of rodents, vermin or infestation of other pests in segregated housing units at said prisons since January 1, 1971, including, without limitation, all sales documents or receipts concerning the purchase of materials to control rodents, vermin or other pests.

23. All documents, reports, files or other papers maintained by medical personnel at the subject prisons concerning the type, quantity and use of tranquilizing drugs (such as, for example, valium and thorazine) dispensed to inmates confined in segregated housing units at each of the subject prisons since January 1, 1971.

24. All files, and papers, however denominated, maintained by the CDC or any sub-division or official thereof in its Sacramento offices or at any

CDC institution, including, without limitation, the inmate central file, which relate to inmates who, on the date of this request, were confined in B-Section at San Quentin, the Security Housing Unit at Folsom, K-Wing at DVI and O-Wing at Soledad. The files and all other official and unofficial papers whatsoever concerning said inmates are to be produced in their entirety, as they existed on the date of this request, together with (i) all miscellaneous matter previously removed therefrom but which, on said date, was still in the possession, custody or control of defendants, or any of them, or their agents or employees, and (ii) all items inserted therein from said date through the actual date of inspection. (If, in the ordinary course, material contained in any of these files, on the date of this request, would be removed prior to the actual date of inspection, it is nevertheless to be retained separately and produced by defendants on said date.) No document or portion of any such file is to be withheld for any reason, including without limitation any "security" classification which may have been assigned to it.

With respect to any and all of the foregoing documents, reference is made to said documents as they existed on the date of this request, together with all additions thereto between said date and the actual date of inspection by attorneys for plaintiffs. In other words, no such documents are to be withheld from said inspection, even though they might in the ordinary course be discarded or destroyed by defendants prior to the inspection date.

Inspection and copying shall continue from day to day until attorneys for plaintiffs have completed their review of the files and papers hereinabove described.

Dated: March 20, 1974.

Respectfully submitted,
J. Anthony Kline
Sidney M. Wolinsky
Charles R. Lawrence, III
Fred J. Hiestand
Vilma S. Martinez
Sanford J. Rosen
William Bennett Turner
James F. Smith
B. E. Bergesen, III
Bernard Zimmerman

By /s/ J. Anthony Kline
J. Anthony Kline
Attorneys for Plaintiffs

Exhibit D

AFFIDAVIT OF RAYMOND K. PROCUNIER

Raymond K. Procunier, being first duly sworn, hereby states under penalty of perjury as follows:

He is Director of Corrections for the State of California and has occupied that position since May 1967; before being appointed to his present position he had extensive experience in all levels of prison administration; he is well acquainted with the problems of institutional administration and with the violent behavior of organized prison gangs. Based upon his experience and knowledge, it is his opinion that:

1. These gangs are made up of inmates who group together in order to accomplish various objectives, including extortion of favors from non-members and gaining control of illicit inmate activities such as drug and narcotic traffic;

2. These gangs engage in assassination of rival gang members, of informants, and of gang members who refuse to carry out assignments by gang leaders or who wish to leave the gang;

3. An attempt to identify and separate gang members in rival factions has reduced gang violence somewhat; however, it is not completely effective;

4. Separation of gang leaders from other members is another means to attempt to reduce the strength of these organizations; but it is essential that the separation include prevention of communication between leaders and followers;

5. Protection of inmates who wish to withdraw from gang activity or to cooperate in ending gang violence is crucial to removing the danger and influence of those gangs and to controlling and identifying their activity and membership;

6. The gangs also exert an influence which extends beyond any single institution and into non-institutional settings;

7. These gangs also present a threat to staff of the Department when they attempt to gain influence or demonstrate power by assaults upon staff members;

8. The violence and organized activities of these gangs pose an immediate threat to other prisoners, to the operation of the correctional system in a humane, productive manner, and to staff members;

9. The increase in gang membership and violence has created an emergency situation, and required major changes in Department policies and practices;

10. In order to effectively separate the gangs and impair or prevent communication of organizational decisions, orders, information, and instructions, to protect those inmates who wish to assist in ending the power, influence and dangers of the gangs and their destructive activities, to reduce the threats and assaults on staff of the Department, to preclude or reduce the conveyance of instructions for illegal acts beyond the prison walls, and to enable the Department to engage in wider programming for rehabilitation as well as public protection, it is essential that the Department retain its ability to make records of its activities, transfer inmates, change custodial status

and programs, and impose restrictions upon communication between inmates while at the same time retaining a degree of confidentiality about its actions. If all records pertaining to gang members or leaders are made available to other, rival gangs or to the membership in the same gang in other institutions, other areas of the same institution, or in a non-institutional setting, the information conveyed would reveal who was assisting in controlling the gangs, their location, their activities, and how they might best be retaliated against. The information could also serve to identify rival memberships and strength. It would severely endanger the ability of the Department to safely protect dissident members, as well as members of rival factions. It would dangerously impair the ability of the Department to end the power, control, violence, threats, illegal activities and influence of these gangs;

11. If this information on the location, group affiliation, and activity of members and leaders of gangs is provided on a blanket basis to attorneys or investigators, they may lack the necessary experience and training to interpret and evaluate it to determine what is and what is not harmful or important. They may inadvertently or unintentionally convey the information which is harmful, whether aware of their action or not. They may find the conflict between the gangs and the restricted communication of the known leaders creates interests which are at odds with each other in respects which affect the method of legal presentation of the various aspects of their client's cases. For example, the records or information supplied by one client orally may indicate he is a protective cus-

tody case attempting to withdraw from gang affiliation and the records or oral information supplied by another client may show he is going to utilize the first client to assassinate a third leader who is a leader in a rival gang but who has not yet been placed into more secure housing. If the attorney abandons the protective custody case as not presenting a classification problem since he voluntarily requested more secure housing, the second client will immediately be aware of the defection from the gang's ranks. If the attorney informs prison officials of the second client's intentions, he may break a confidence. If the third person is placed in more secure housing, the attorney may find he is representing the intended victim of another client who is attempting to contract the death with an unwilling assassin who is also his client. Under these circumstances, revelation of information will be against the interest of some client even though it may benefit another. Further, to attack the classification of the intended victim would in effect urge removal of that protection;

12. Based upon my experience and factors such as the foregoing, it is my opinion that attorneys should not represent clients who are members of rival factions and that access to files on inmates should be carefully restricted, as should any personal contact;

13. At the same time, I have no desire to preclude legitimate activities, nor to unduly hamper anyone's ability to question the conditions of their confinement in the courts. Such channels of protest are welcomed because they provide an outlet through socially ac-

ceptable, legal, means of protest and because they serve as another means for auditing department procedures;

14. Therefore, it is my opinion that the disruption of institutional activity, danger to persons and institutional security, and other potential harm likely to result from unlimited attorney and investigator access to confidential information is sufficiently serious that it justifies restricting attorney and investigator access. In view of the inmate's right to present his legal grievances to the courts and our policies on such court actions, some less onerous means than a total refusal to permit interviews or examination of information within the files is desirable to the department, and for this reason we instructed our attorneys today not to seek to preclude such interviews or examination on an absolute basis;

15. As a reasonable minimum set of protections, the following should not be exceeded:

(a) Attorneys should be required to obtain written consent from the inmate whose file they wish to examine or who they wish to interview, and such consent should be informed consent in that the attorney should be required to disclose in writing who his other clients are, why he seeks the information, the issues in the case, and the fact he may represent rival factions and may make the information obtained public.

(b) The inmate should be informed in writing that he need not become a plaintiff if he does not wish to do so, and that he need not talk to the attorney or investigator nor consent to a review of his file.

(c) The department should be given the opportunity to review each file and identify confidential materials of two classes with attorneys or investigators precluded from revealing the contents of one class and precluded from viewing materials which are both confidential and if revealed, dangerous to the physical well being or psychological health of any person. Items in the latter class would be removed from the file and made available to our attorneys to present to the court for in camera hearing upon request by plaintiff's counsel.

(d) Interviews consented to by inmates should be conducted during normal working hours on a mutually acceptable schedule, with due regard for the rehabilitation programming and duties of the inmate, the staffing requirements and physical plant of the institution, and the travel and time requirements of the attorneys or investigators. Except for these plaintiffs, the numbers of interviews should be restricted to one, unless there was a change in the prospective inmate witness's housing. The named plaintiffs would enjoy the normal frequency and time of interviews that any other inmate in like circumstances would since they would have a clearly established attorney-client relationship to which they would be on record as having given their consent.

The above restrictions, under present conditions, would appear to afford some degree of protection and only minor inconvenience for plaintiff's counsel. Any less restrictive situation would have a very high probability of harm to persons, of encouraging gang activ-

ity, and of threatening institutional security and the orderly administration of the correctional system;

16. While this statement is phrased in largely predictive language, the consequences of not preventing violence have been made altogether clear by the enormous number of killings within the past three years. The present situation within California's prisons and the gravity of the consequences of improper evaluation of that situation in my opinion compel at least the cautions mentioned in 15 above. While even these have a higher degree of danger than I would voluntarily accept, if current department rules, policies, or procedures are to be set aside the limitations of 15 above are provided for the court as my evaluation of the outer limits of safety.

Executed on June 6, 1974, at Sacramento, California.

/s/ Raymond K. Procunier
Raymond K. Procunier

Subscribed and sworn to before me
this 6th day of June, 1974.

(Seal) Anne Lowe

Notary Public in and for said
County and State

My Commission Expires Feb. 9, 1978